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No. 03-1039 (6)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

JEANNE WOODFORD,
Warden of the California State Prison at San Quentin,
Petitioner

v.

WILLIAM CHARLES PAYTON,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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By appointment of the U.S. Court of Appeals for the Ninth Circuit under the Criminal Justice Act of 1964, 18 U.S.C § 3006A(d)(6)

QUESTION PRESENTED

Does the Ninth Circuit's holding that the California Supreme Court was objectively unreasonable in denying penalty relief under the unique facts presented in this case merit certiorari review?

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I. INTRODUCTION

The state has framed the question presented in this case as whether the Circuit "violate[d] 28 U.S.C. § 2254(d) when it found the California Supreme Court objectively unreasonable in holding that California's 'catch-all' mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation." The problem with the state's framing of the issue, however, is that the question is *not* presented in this case. The Circuit did *not* hold that the California Supreme Court's interpretation of the state's "catch-all" mitigation instruction was wrong, unconstitutional, or objectively unreasonable. The Circuit held only that, under the unique circumstances presented by this case, the California Supreme Court was objectively unreasonable in finding that there was no reasonable likelihood that the jury believed it could not consider Payton's mitigating evidence.

Both the salient circumstances and the actual holding by the Circuit are virtually ignored by the state in its petition. The state would have this Court think that the Circuit reviewed, in the abstract, the state's "catch-all" mitigation instruction as it relates to post-offense mitigating evidence and then found the instruction unconstitutional, virtually ignoring all of the factors this Court has previously relied upon in measuring the likelihood that the jury was misled by an

ambiguous instruction. The Circuit did no such thing. It reviewed the specific facts of the case, the instructions as a whole, the rulings of the trial court and the arguments of the attorneys to the jury and found objectively unreasonable the California Supreme Court's holding that Payton's jury was not misled into believing it could not consider Payton's post-offense mitigating evidence.

There is nothing wrong or remarkable about the Circuit's opinion. The state attempts to paint it that way by omitting the salient facts and the actual holding by the Circuit. When considered in context, the Circuit's opinion is a straightforward, unremarkable and correct application of this Court's Eighth Amendment and AEDPA jurisprudence.

II. STATEMENT OF THE CASE

William Charles Payton was charged in the Superior Court of California in Orange County with capital murder, including a special circumstance of murder during the commission or attempted commission of rape of Pamela Montgomery, the attempted murder of two other persons, and the use of a knife during the commission of the crimes. The incident occurred in the early morning hours of May 26, 1980, at a boarding house in which all victims resided and in which Mr. Payton, a former resident, had been given permission to stay overnight.

No evidence was presented on Mr. Payton's behalf at the guilt phase of the

trial. Mr. Payton's entire penalty phase presentation consisted of evidence relating to his post-crime conduct, during the more than one and one-half years elapsing between his arrest and his trial. That evidence related to Mr. Payton's post-crime conversion to Christianity and his conduct following that conversion, bearing upon both his present character and the prospects of his adaptability to prison life. Eight witnesses testified to the sincerity of Mr. Payton's religious commitment, including a deputy sheriff, other prisoners, his mother, and members of the clergy. One prisoner testified that had it not been for Mr. Payton's intervention, he unquestionably would have committed suicide. Other prisoners testified as to Mr. Payton's successful efforts in organizing and assisting in bible study classes in jail, and the effect that Mr. Payton's religious commitment, as well as the example he set by living that commitment, had on their lives. This evidence was corroborated by a deputy sheriff assigned to the jail, who testified that Mr. Payton's presence and activities while in custody operated as a significant calming influence among the jailed prisoners.

During an in-chambers conference with counsel for the parties conducted immediately before the commencement of penalty argument, defense counsel orally requested that the court's instructions to the jury be modified by changing the language of factor (k) to direct the jury to consider Mr. Payton's post-arrest

conduct.[1] Even though it concluded that the case law supported the view that "almost anything can come in on behalf of the defendant, be argued," the trial court refused the requested instruction, and then authorized each side to argue its own view of whether the jury was legally permitted to consider such post-arrest evidence.

The prosecutor commenced his argument by reviewing the statutory factors that the jury could consider in deciding whether or not to sentence Mr. Payton to death. He noted that the jury is required to go through a weighing process of those factors. He observed that the penalty evidence presented by the defense did not fit within any of the factors (a) through (j), and when he got to factor (k), he told the jury:

> "K" says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact - - okay? - - some factor *at the time of the offense* that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new-born Christianity.

RT 2121-2122 (emphasis added).

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[1] Factor (k), the final or "catch-all" factor, was intended to permit the jury to consider all mitigating evidence offered by the defendant in support of a verdict of life. It provided for consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The jury instruction relating to factor (k) has since been amended, pursuant to the California Supreme Court decision in *People v. Easley*, 671 P.2d 813, 826 n.10 (Cal. 1983), to include language which encompass the modification requested by Payton's counsel.

At this point, defense counsel objected and moved at sidebar for a mistrial. The court denied the motion. Counsel then requested that the court instruct the jury that the post-crime evidence he presented on behalf of Mr. Payton does fall within the "catch-all" instruction of factor (k). The court refused counsel's request, advised both counsel that they were free to argue to the jury their own interpretation of factor (k),[2] and then instructed the jury that the comments of both the prosecution and defense are not evidence and should be placed in their "proper perspective."

With that, the prosecutor continued to state his view of whether Mr. Payton's evidence fit within factor (k):[3]

> Referring back to "K" which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and that he helped the module deputies in the jail while he was in custody.
>
> The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to lessen the gravity of the offense that the defendant has committed.
>
> [Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when--

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[2] The state's petition fails to advise this Court of (1) defense counsel's request that the trial court instruct the jury that such post-crime evidence must be considered by it in its determination of penalty; (2) the court's refusal to so instruct; and (3) the court's ruling that counsel were free to argue their own interpretation of the meaning of factor (k).

[3] The state's petition fails to advise this Court of the numerous constitutionally erroneous statements made by the prosecutor made after the trial court denied defense counsel's motion for mistrial and for an instruction that factor (k) did permit consideration of Payton's mitigating evidence.

under any other circumstance which extenuates or lessens the gravity of the crime, refers -- seems to refer to a fact in operation at the time of the offense.

What I am getting at, you have not heard during the past few days any legal evidence [of] mitigation. What you've heard is just some jailhouse evidence to win your sympathy, that's all.

You've not heard any evidence of mitigation in this trial."

RT 2125.

.....

To vote for life without the possibility of parole in this case is to say that somewhere there are mitigating factors that outweigh the aggravating and outrageous factors of what the defendant did, and you've heard no evidence of any mitigating factors.

RT 2129.

.....

I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because I don't think its really applicable and I don't think it comes under any of the eleven factors....

RT 2129.

.....

You haven't heard anything to mitigate what he's done. If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did...

RT 2132-33.

Defense counsel argued that he disagreed with the prosecutor as to whether factor (k) covered Mr. Payton's post-crime conduct. He argued that such conduct

was covered, though he acknowledged that the language of factor (k) was "awkwardly worded." RT 2151.

The trial court instructed the jury as to the factors that they were to consider and be guided by in deciding whether Mr. Payton would suffer death or life without the possibility of parole. Factor (k), the only factor which both parties agreed could conceivably cover Mr. Payton's post-crime conduct, provided for consideration of "any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime."

The jury returned a verdict of death. That verdict was affirmed on appeal by the California Supreme Court, but the federal district court set aside the sentence of death in federal habeas corpus proceedings, on the ground that the prosecutor's erroneous penalty argument misled the jurors and prejudicially violated Mr. Payton's due process rights. A three judge panel of the Ninth Circuit reversed the district court, but that decision was vacated as to the penalty finding by an en banc panel of the Ninth Circuit, which held there was a reasonable likelihood, based on the facts of Mr. Payton's case, that the jury applied the factor (k) instruction in a way that prevented consideration of his mitigating evidence. This Court vacated the judgment of the en banc court and remanded the case to the Circuit for reconsideration in light of *Woodford v. Garceau*, 538 U.S. 202 (2003). On

remand, the en banc court again affirmed as to penalty, holding that the decision of the California Supreme Court, in affirming the jury's verdict of death, was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d)(1). The state then filed its petition for writ of certiorari with this Court.

III. REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

A. The State's Erroneous Portrayal of the Facts in *Payton* and the Findings of the En Banc Court Belie the State's Claim that Intervention by This Court is Necessary.

1. The State's "Question Presented" For Review by This Court Is Not At Issue.

The only "Question Presented" in the state's petition is:

> Did the Ninth Circuit violate 28 U.S.C. § 2254 (d) when it found the California Supreme Court objectively unreasonable in holding that California's "catch-all" mitigation instruction in capital cases is constitutional as applied to post-crime evidence in mitigation?

As Payton has already pointed out, the Circuit did *not* find that the state court was unreasonable in holding that the factor (k) mitigation instruction was constitutional as applied to post-crime evidence. The predicate to such a finding would have been that the Circuit first found that factor (k) *is* constitutionally *invalid* as applied to post-crime mitigation evidence. In fact, the Circuit made no

such finding anywhere in its opinion. Instead, the Circuit observed that "[a]ny natural reading of the words of the [instruction] does not support the inclusion of post-crime evidence because mitigation evidence occurring after a crime cannot possibly 'extenuate the gravity of the crime.'" *Payton*, 346 F.3d at 1212. The Circuit's purpose for making this observation, however, was not to declare factor (k) constitutionally defective as applied to post-crime evidence, but rather to make clear why the Circuit found that "*Boyde's* conclusions about the plain wording of factor (k) and the instruction's obvious inclusion of pre-crime background evidence therefore do not apply in this case." *Id.* Indeed, throughout the opinion, the Circuit makes clear that factor (k) is – as this Court found in *Boyde v. California*, 494 U.S. 370 (1990) – ambiguous,[4] and *not*, as the state erroneously contends, facially unconstitutional as applied to post-crime evidence.

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[4] For example:
"Here, in contrast, the jury received not only an ambiguous factor (k) instruction, but also...." *Id.* at 1214.
"Here, however, the jury was confronted with an ambiguous factor (k) instruction and with post-crime mitigating evidence that, unlike the pre-crime character and background evidence in *Boyde*, did not fit clearly within the plain wording of the instruction." *Ibid.*
"Because a natural reading of the unadorned factor (k) instruction already favored the prosecutor's interpretation, defense counsel faced a prodigious hurdle in trying to convince the jury of the proper interpretation." *Id.* at 1215, n.16.

2. The State's Petition Fails to Fairly Present Facts Critical to The En Banc Court's Decision.

The erroneous presentation of the question for this Court's review is not the only mischaracterization employed by the state in its petition. Throughout its pleading, the state utterly fails to articulate and address unique facts relied upon by the en banc court in reaching its conclusion.

In addressing the erroneous argument of the prosecutor, the state's petition says only:

> The prosecutor argued, in pertinent part, that the instruction "doesn't refer to anything after the fact or later," and defense counsel unsuccessfully moved for mistrial.

Petition, at 4.

The state omits the following "explicit, deliberate, consistent, and repeated" (*Payton*, at 1213) improper prosecutorial argument articulated by the Circuit:

> 'K' says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact . . . *at the time of the offense* that somehow operates to reduce the gravity for what the defendant did. *It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.*

Id. at 1213 (emphasis, added by court, in original).

> Referring back to 'K' which I was talking about, any other

> circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with Defendant's new Christianity and that he helped the module deputies in the jail while he was in custody. *The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.* [The defense] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that could happen when - - under any other circumstance which extenuates or lessens the gravity of the crime, refers - - seems to refer to a fact in operation *at the time of the offense.* What I am getting at, *you have not heard during the past few days any legal evidence [of] mitigation.* What you've heard is just some jailhouse evidence to win your sympathy, and that's all. *You've not heard any evidence of mitigation in this trial.*
>
> - - - -
>
> I want to make a few comments about religion, the only evidence put on by the defendant. I don't really want to spend too much time on it because *I don't think it's really applicable and I don't think it comes under any of the eleven factors ... .*

Id. (emphasis, added by court, in original).

As the Circuit made clear in its opinion, one of the critical factual differences between *Payton* and *Boyde* is that in *Boyde*, there was "'no objectionable prosecutorial argument.' Indeed, the prosecutor never suggested to the jury that it could not consider mitigating evidence of Boyde's character and background. 494 U.S. at 385. The prosecutor '*explicitly assumed* that petitioner's character evidence was a proper factor in the weighing process.'" *Payton*, 346

F.3d at 1212 (emphasis, added by court, in original).

This improper argument -- a decisive factor in the Circuit's decision and one that differentiates *Payton* from *Boyde* -- is not addressed by the state.

The state also completely fails to address the Circuit's consideration of the trial court's stunningly curious and wrong decision to let both sides argue their own personal views of the *legal significance* of factor (k), i.e., whether the jury must consider Payton's post-crime evidence in its determination of whether to impose death. The state simply represents that, "The majority concluded that because the prosecutor in Payton's trial misstated the law and Payton's mitigation evidence was post-crime, the California Supreme Court was objectively unreasonable in applying *Boyde's* principles to Payton's case." Petition at 10.

Notwithstanding the unique convergence of repeated and erroneous prosecutorial argument with an ambiguous factor (k) instruction, the Circuit noted that the trial court's laissez-faire attitude effectively added injury to insult:

> [T]he court explicitly authorized the prosecutor to argue that Payton's post-crime mitigating evidence could not be considered under factor (k), overruled defense counsel's objections to the prosecutor's legal misstatements and failed to instruct the jury that it must consider and give effect to Payton's post-crime mitigating evidence. . . . Indeed, the jury was presented with the prosecutor's and the defense attorney's conflicting arguments about whether it legally could consider Payton's mitigating evidence under factor (k), and the court left it up to the *jury* to choose which version of the law to apply.

> When the court expressly permits counsel to argue the legal meaning of an instruction, without ever instructing the jury which interpretation is correct, the arguments of counsel obviously take on significant importance. A lay jury is ill-equipped to determine which view of the law is correct.

346 F.3d at 1215 (emphasis in original; footnotes omitted).

These factual alignments were critical to the Circuit's holding, yet are omitted in the state's petition.

3. The State's Petition Mischaracterizes the Findings of the En Banc Court and the Implications of Its Decision.

The state contends that "[t]he implications of the majority's decision extend far beyond the reversal of Payton's death penalty," and alleges that this decision "jeopardizes the validity of numerous death penalty cases in California in which the defendant relied, at least in part, on post-crime mitigation evidence. . . ." Petition at p. 21. This contention is utterly fallacious.

As noted above, and contrary to the State's underlying central theme here, the en banc court in *Payton* did not rule that factor (k) is constitutionally invalid when applied to post-crime evidence; it held only that, given the combination of facts presented, it was objectionably unreasonable to hold that the lay jury believed post-crime evidence was to be considered under factor (k) just like pre-crime character evidence. More importantly, the en banc court noted that,

"According to *Boyde*, 'the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.'" *Id.* at 1214. The Circuit's ruling makes it crystal clear that the decision granting penalty relief is based exclusively on the court's consideration of the unique facts present in *Payton*. Nothing articulated in *Payton* will impact other California cases dealing with the same, now-extinct, ambiguous instruction.

The state further contends that, "The Ninth Circuit's limitation of *Boyde* further jeopardizes other California death judgments because the Ninth Circuit uses it as a basis for ordering California trial courts to rewrite its jury instructions to call for pinpoint consideration of a defendant's specific category of mitigation evidence." Petition at 22. This contention is disingenuous. Placed in proper context, the Circuit said:

> Far from a fair assurance that the error was harmless, the "possible jury confusion" arising from the trial court instruction leaves us "in grave doubt about the likely effect of [the] error on the jury's verdict." [Citations omitted.] We therefore conclude that the instructional error had a "substantial and injurious effect or influence on the jury's verdict" that necessitates a new penalty phase trial. Payton is entitled to a penalty trial before a jury that is properly instructed that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death.

Id. at 1218.

In the context of the opinion, nothing in that language directs that trial

courts construct a "pinpoint" instruction drawing attention to the specific post-crime mitigating evidence presented by the defendant. It merely recites that Payton is entitled to an instruction, which, unlike the ambiguous un-adorned factor (k) instruction used in his penalty trial, makes clear that such post-crime evidence must be considered by the jury in its determination of whether to impose the sentence of death. Indeed, earlier in the opinion, the Circuit notes that after Payton's death verdict, the California Supreme Court, in *People v. Easley*, 671 P.2d 813, 826 n.10 (1983), held that trial courts should inform the jury that factor (k) includes any mitigating background and character evidence that the defendant presents in mitigation, and that as a consequence, the instruction was amended to "ensure that the jury consider 'any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.'" *Id.* at 1210, n.5. In this context, it is patently clear that the Circuit recognizes that the amendment to the factor (k) instruction has obviated the problems created by the ambiguous instruction which is the subject of this litigation, and that such amendment will "properly instruct[ ] [the jury] that it must take his post-crime evidence into account in determining whether to impose a sentence of life or death." *Id.* at 1218. In short, the Circuit did not compel trial courts to draft

instructions that direct California juries to consider post-crime mitigation evidence because the California Supreme Court – long ago – provided for such consideration.

B. The Facts of *Payton* and the Opinion of the En Banc Court Do Not Present Issues Worthy of Certiorari Review.

The *Payton* decision reflects the Circuit's considered evaluation of the particular facts and circumstances of the Payton trial in the context of this Court's mandate that the sentencer "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). This Court's decision in *Boyde v. California*, 494 U.S. 370 (1990), established the standard for reviewing jury instructions which are "ambiguous and therefore subject to an erroneous interpretation." *Id.* at 380. That standard established constitutional error where "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* In *Boyde*, this Court further held that the determination of the effect of such ambiguous instruction on

the validity of a conviction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge," *id.* at 378, and in "the context of the proceedings." *Id.* at 383. But the "context" of the Payton proceedings were dramatically different from those in *Boyde*, and it is this factual departure that forms the basis of the Circuit's determination that the California Supreme Court was objectively unreasonable in failing to find constitutional error. The state court's evaluation of Payton's case consisted simply of adopting the factors articulated in *Boyde* as being applicable to Payton's trial, notwithstanding the dramatic factual differences between the two cases. It is because of these factual differences that the Circuit concluded that cases such as *Skipper* and *Penry v. Lynaugh*, 492 U.S. 302 (1989) – not *Boyde* – constitute the "clearly established Federal law" which governs the outcome of this case. 28 U.S.C. § 2254 (d)(2); 346 F.3d *Payton* at 1211.

As detailed in the *Payton* en banc opinion, the California Supreme Court was objectively unreasonable in failing to find constitutional error in the following critical respects:

1. The Difficulty of Subsuming Post-Crime Evidence Within the Unadorned Factor (k).

The unadorned language of the factor (k) instruction does not readily

allow consideration of post-crime evidence. That instruction, providing for consideration of "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," while allowing for *pre-crime* evidence relating to the background and character of the defendant, does not obviously allow for consideration of circumstances *after* the crime because -- as the prosecutor argued repeatedly to the jurors -- the instruction "doesn't refer to anything after the fact [of the crime] or later." As the en banc opinion made clear, this Court in *Boyde* "explicitly distinguished the character and background evidence at issue there from evidence that 'pertain[s] to prison behavior after the crime for which [the petitioner] was sentenced to death . . ." – the evidence presented in this case. 346 F.3d at 1212, citing *Boyde*, 494 U.S. at 382, n.5. Inexplicably, the majority of the California Supreme Court completely failed to even consider this distinction, even though it was prominently raised in the state court dissent. *See People v. Payton*, 3 Cal.4th 1050, 1082-1085 (Kennard, J., dissenting). This inexplicable failure of the California Supreme Court to consider the distinction between the post-crime nature of the mitigating evidence presented by Payton and the pre-crime evidence presented by Boyde constituted an unreasonable application of clearly established Federal law. *Payton*, 346 F.3d at 1211.

2. The Pervasiveness of the Prosecutor's Erroneous Argument.

While the California Supreme Court acknowledged that the prosecutor's argument was erroneous, it found such error did not result in a "reasonable likelihood" that the jury believed it could not consider such evidence. But the state court's evaluation of the impact on the jury was articulated on the basis of only *one* of the prosecutor's improper comments. The state court's determination failed to consider the cumulative impact of the prosecutor's pervasively erroneous argument,[5] even in the face of the argument of the dissenting justices that "the prosecutor told the jury several times that it could not legally consider defendant's mitigating evidence." *People v. Payton*, 3 Cal.4th at 1081 (Kennard, J., dissenting). The state court's failure to consider the extent of the prosecutor's erroneous argument was an unreasonable application of clearly established federal

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[5] The only erroneous argument evaluated by the state court was the following:

> "The factor, he told the jury, 'says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some . . . factor at the time of the offense that somehow operates to reduce the gravity for what the defendant did. [¶] It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.'" *People v. Payton*, 3 Cal.4th at 1071.

law. *Payton v. Woodford*, 346 F.3d at 1213.

Moreover, the California Supreme Court failed to consider that in *Boyde*, unlike Payton, the prosecutor did *not* engage in any erroneous argument urging the jury that they could not consider the mitigating evidence Boyde presented. The en banc court noted that "[k]ey to the Court's reasoning [in *Boyde*] was the fact that there was 'no objectionable prosecutorial argument.' Indeed, the prosecutor never suggested to the jury that it could not consider mitigating evidence of Boyde's character and background." *Id.* at 1212. That was certainly not the case in Payton's trial, but that distinction was nowhere noted in the state court evaluation.

After quoting the prosecutor's erroneous argument urging the jury that they could not legally consider Payton's mitigating evidence, the en banc court made note of the California Supreme Court's observation that, "[l]ater in his closing argument, the prosecutor implicitly conceded the relevance of defendant's mitigating evidence by devoting substantial attention to it." *People v. Payton*, 3 Cal.4th at 1071. The en banc court took issue with that finding, concluding that the prosecutor's statement appears directly to contradict such finding. 346 F.3d at 1213, n.12. That same conclusion was reached by Justice Kennard in her dissent in the state court decision. She observed:

> According to the majority, the prosecutor "implicitly conceded" that the defendant's mitigating evidence was relevant, by devoting "substantial attention" to it. [Citation omitted.] But the prosecutor made no such concession. True, he did discuss defendant's evidence, but he prefaced his remarks by reminding the jury that the evidence was not "applicable." In essence, the prosecution asserted that even if the evidence of defendant's Christian conversion was relevant, it did not outweigh the aggravating circumstances in this case. At no time did the prosecutor acknowledge, explicitly or implicitly, that the jury could legally consider defendant's mitigating evidence.

People v. Payton, 3 Cal.4th at 1085 (Kennard, J., dissenting).

The en banc court noted that although the California Supreme Court recognized that the prosecutor argued a "narrow and incorrect interpretation of factor (k)," it concluded that any impact such argument might have had on the jury was "immediately blunted by defense counsel's objection, which led the court to remind the jury that lawyers' comments were 'not evidence' but 'argument' and 'to be placed in [their] proper perspective.'" *Payton*, 346 F.3d at 1213, *quoting* *People v. Payton*, 3 Cal.4th at 1071. The en banc court found this application of *Boyde* to be unreasonable, because the trial court "provided no clarifying instructions as to the proper scope of factor (k) to 'blunt' the prosecutor's legally erroneous statements." *Payton*, 346 F.3d at 1214, n.13. Moreover, the court's instruction did nothing to curtail the prosecutor's erroneous argument. In fact, right after the court's instruction, as noted above, the prosecutor took up right

where he left off before the objection, but this time with impunity.[6] Indeed, Justice Kennard's response to the majority opinion concluding that the trial court's instruction "blunted" the prosecutor's improper argument was simply:

> Not so. The trial court overruled that objection, permitting the prosecutor to repeat the improper argument. Although the trial court told the jury that the arguments of counsel were "not evidence," this admonition did not assist the jury in evaluating the legal soundness of the prosecutor's argument.

People v. Payton, 3 Cal.4th at 1084 (Kennard, J., dissenting).

The California Supreme Court also found that the prosecutor's argument was "blunted" by "defense counsel's correct statement of the law." *People v. Payton*, 3 Cal.4th at 1073. The en banc court found, however, that such conclusion was an unreasonable application of *Boyde* for two reasons. First, it was unreasonable for the state court to assume that the jury, "which received instructions that *both* attorneys' statements were merely argument and not evidence, would accord *more weight* to defense counsel's argument, containing correct statements of the law with respect to factor (k), such as to 'blunt' the effect of the prosecutor's misstatements about factor (k)." *Payton v. Woodford*, 346 F.3d at 1214, n.13 (emphasis added). Second, the Court in *Boyde* characterized the

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[6] The prosecutor resumed his argument by stating: "Referring back to 'K' which I was talking about . . . ."

statements of attorneys as ordinarily being viewed as statements of advocates, which "generally carry less weight than do instructions from the court." *Boyde*, 494 U.S. at 384. "According to *Boyde*, only instructions by the court have the force to 'blunt' attorneys' comments."[7] *Payton*, 346 F. 3d at 1214, n.13. The state court's conclusion that the defense argument "blunted" the effect of the prosecutor's constitutionally impermissible argument was, accordingly, objectively unreasonable, particularly in light of the weight this Court gave to attorney statements in *Boyde*. Moreover, "[b]ecause a natural reading of the unadorned factor (k) instruction already favored the prosecution's interpretation, defense counsel faced a prodigious hurdle in trying to convince the jury of the proper interpretation." *Id.* at 1215, n.16. As Justice Kennard noted:

> Although defense counsel told the jury it was legally entitled to consider the evidence of defendant's Christian conversion, he was unable to point to any language in [the unadorned factor (k)] that would support this claim. Instead, he could only suggest that although the instruction was "awkwardly worded," it nevertheless was designed to include the evidence presented by the defense. A reasonable jury would not have been persuaded by this unconvincing, unsupported assertion.

People v. Payton, 3 Cal.4th at 1086 (Kennard, J., dissenting).

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[7] The en banc court went on to note that in this case, however, "the trial court provided no clarifying instructions as to the proper scope of factor (k) to 'blunt' the prosecutor's legally erroneous statements." *Id.*

Finally, as noted below, in refusing to instruct the jury whether it could consider Payton's post-crime evidence under factor (k), the court effectively left it up to the jury to decide the law which would govern its judgment. Under these circumstances, "the arguments of counsel obviously take on significant importance." *Payton*, 346 F.3d at 1215.

3. The Failure of the Trial Court to Properly Instruct the Jurors.

The Circuit's determination that the California Supreme Court unreasonably applied *Boyde* in affirming Payton's conviction was grounded only in part on the fact that post-crime evidence did not easily fall within the language of factor (k), coupled with the prosecutor's unrelenting improper argument. Central to the Circuit's conclusion was a consideration of the effect of the trial court's failure to guide the jury as to whether it could consider such evidence in its determination of penalty.

Even before penalty argument commenced, out of the presence of the jury, defense counsel advised the court of his concern that the court's standard instructions, which listed the eleven factors that bound the jury in determining punishment, did not appear to cover consideration of the evidence Payton had presented during the penalty phase. Counsel requested that the court modify factor

(k) to include consideration of defendant's "character, background, history, mental condition and physical condition," as authorized by the language of California Penal Code Section 190.3. *See Payton*, 346 F.3d at 1208, and *see* Petition, Appendix G.

Although the court agreed that case law seemed to permit consideration of Payton's evidence, it refused to modify the jury instructions to include the requested language, though the court did authorize counsel to argue that such evidence should be considered. *Id.* But before defense counsel could make that argument, the prosecutor argued to the jury that factor (k) did *not* permit the jury to consider Payton's post-crime evidence. Defense counsel asked to approach the bench, and there he objected to the argument and moved for a mistrial. That motion was denied. Counsel asked the court to instruct the jury that the evidence presented by the defense during the penalty phase is covered under factor (k). The court refused to so instruct the jury, and in addition ruled that the question of whether Payton's mitigation evidence was covered under factor (k) was subject to "fair comment on either side," and that the question could be argued "either way." *Id.* at 1209.

Just before the prosecutor resumed his argument, the court instructed the jury that counsel's comments are not evidence, that the jury heard the evidence,

that "this is argument, [a]nd it's to be placed in its proper perspective." *Id.* At that, the prosecutor continued his repeated urging that Payton's evidence could not be considered by the jury because it did not fall within factor (k) (or any other factor the jury was allowed to consider). The prosecutor's argument was followed by that of the defense, which urged just the opposite, i.e., that such evidence could be considered by them. The one area of agreement by both advocates was that the jury was bound by factors (a) through (k) in its determination of whether to impose the sentence of life or death. *Id.* at 1213 (prosecutor), 1209 (defense).

The question of whether Payton's penalty phase evidence was covered under factor (k) was not a matter of "evidence" heard by the jury. It was an issue of law, for which the jury had no guidance[8] except the arguments of counsel and the context of the other instructions which the court would give the jury. As noted by the en banc court, the jury was "presented with the prosecutor's and the defense attorney's conflicting arguments about whether it legally could consider Payton's mitigating evidence under factor (k), and the court left it up to the *jury* to choose which version of the law to apply." *Payton*, 346 F. 3d at 1215 (footnote omitted,

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[8] As Justice Kennard observed in the *Payton* state court dissent, although the trial court told the jury that the arguments of counsel were not evidence, "this admonition did not assist the jury in evaluating the legal soundness of the prosecutor's argument." 3 Cal.4th at 1084 (Kennard, J., dissenting).

emphasis in original). As the en banc court noted, "A lay jury is ill-equipped to determine which view of the law is correct."[9] *Id.*

The state cannot credibly defend the actions of the trial court in leaving it up to the jury to decide whether Payton's evidence fit within the language of factor (k). As Justice Kennard observed:

> The trial court's ruling was wrong. The proper scope of factor (k) is a question of *law*, not of fact. It is the trial court's duty to explain the law to the jury, not to place upon the jury the impossible burden of deciding which of two inconsistent views of the law is correct.

People v. Payton, 3 Cal.4th at 1084. (Kennard, J., dissenting) (emphasis in original).

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[9] The en banc court also discussed the California Supreme Court's observation that mitigation testimony was presented without objection in Payton's case, and that it was unlikely that "reasonable jurors would believe the court's instructions transformed all of [defendant's] favorable testimony into a virtual charade." *Id.* at 1214, n.14, quoting *People v. Payton,* 3 Cal.4th at 1072 (quoting from *Boyde*, 494 U.S. at 383). That observation was compelling in *Boyde*, which concerned only an ambiguous factor (k) instruction. But here, the jury was not only dealing with an ambiguous instruction, but also "explicit, repeated arguments by the prosecutor that the defense had presented no mitigating evidence and that post-crime mitigating evidence does not fit within factor (k). This, coupled with the court's instruction that the jury consider the arguments of counsel, calls into doubt the court's apparent certainty that the jury did not ignore Payton's mitigating evidence." *Payton*, 346 F.3d at 1214, n.14. Moreover, presumably the jury was not schooled in either the admissibility or relevance of penalty phase evidence. Where, as here, the court expressly leaves it up to the jury to decide whether such evidence could be considered by them, why would the jury *not* believe that they were the final arbiters of what evidence is relevant and what evidence is not? Stated another way, it is unlikely that the jury could view *Payton's* mitigating evidence as a "charade" if the jury believed it was up to them to listen to such evidence and then determine whether it fell within factor (k).

Nor did the court's later penalty instructions to the jury provide any help in resolving this "impossible burden." Those instructions (set out below in n.10), although directing the jury to "consider all of the evidence which has been received during any part of the trial in this case," provided further, "*except as you may hereafter be instructed,*" and were followed by the listing of factors (a) through (k).[10] The instructions further provide that "after having heard all of the

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[10] The following comprised the entire penalty instructions given by the court. These instructions were preceded by selected guilt phase instructions which are not delineated here because they are not pertinent to any of the claims discussed herein:

> In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
> (A), the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances fund to be true.
> (B), the presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.
> [C] Presence or absence of any prior felony conviction.
> [D] Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> [E] Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
> [F] Whether or not the offense was committed under circumstances which defendant reasonably believed to be a moral justification or extenuation for his conduct.

(continued...)

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[10](...continued)

> (G), whether or not the defendant acted under extreme duress or under the substantial domination of another person.
> (H), whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defects or the effects of intoxication.
> (I), the age of the defendant at the time of the crime.
> (J), whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.
> (K), any other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime.
>
> The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under a special circumstance has been found to be true. It is the law of this state that the penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances charged in this case has been found to be true.
>
> Under the law of this state, you must now determine which of said penalties shall be imposed on the defendant.
>
> It is now your duty to determine which of the two penalties, death or confinement in the state prison without possibility of parole, shall be imposed on the defendant.
>
> After having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.
>
> However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.
>
> You shall now retire and select one of your numbers to act as foreman who will preside over your deliberations.

(continued...)

evidence *and after having heard and considered the argument of counsel*, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." These instructions, noted by both the en banc court, 346 F.3d at 1215, and Justice Kennard in her state court dissent, 3 Cal.4th at 1086, make clear that the jury's authority to consider "all of the evidence" was not unlimited, but rather was guided by factors (a) through (k), and the jury's consideration of these factors should be made "after having heard and considered the argument of counsel." In the words of Justice Kennard,

> This instruction could only strengthen the prosecutor's erroneous and repeated argument to the jury that it could not legally consider the defendant's mitigating evidence, and the jury may well have acted accordingly.

Payton, 3 Cal.4th at 1086, (Kennard, J., dissenting).

In stark contrast to the above, the majority of the California Supreme Court twice cited only that portion of the instructions which directed the jury to consider

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[10](...continued)

In other words, to make a determination to the penalty, all 12 jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then shall return it to this courtroom.

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"all of the evidence"[11] without even discussing the impact of the limitation of that evidence by the listed factors (a) through (k) and the direction that the jury be guided by the arguments of counsel. The failure of the state court to evaluate factor (k) in the context of the trial court's instructions as a whole constitutes an unreasonable application of *Boyde*.

4. The Cumulative Effect of the *Payton* Facts.

Payton's unique factual scenario combined to render a "reasonable likelihood" that the jury believed they could not consider the only evidence Payton presented in mitigation of a sentence of death. These facts included: (1) the extensive, deliberate and repeated argument of the prosecutor urging the jury that it could not consider Payton's mitigating evidence in its determination of whether to impose death; (2) the trial court's abdication of its duty to instruct the jury that

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[11] With respect to the penalty instructions relating to factor (k), the California Supreme Court said *only:*

> "The high court's observation is especially apt when the trial court, as here, has also instructed the jury to consider all of the evidence which has been received during any part of the trial in determining the penalty." 3 Cal.4th at 1072.
>
> "Moreover, while the prosecutor's interpretation of factor (k) was clearly incorrect, any force it might have had was blunted by the court's instruction to consider all of the evidence, the prosecutor's own discussion of defendant's mitigating evidence, and defense counsel's correct statement of the law." 3 Cal.4th at 1073.

it must consider such evidence; and, (3) an ambiguous instruction which does not readily admit to consideration of post-crime evidence. 346 F.3d at 1215. The facts in *Boyde* contained none of these critical factors which compel the appropriate outcome in this case. Indeed, Payton's case bears substantially greater similarity to *Penry v. Lynaugh*, 492 U.S. 302, than it does to *Boyde*. There, this Court reversed a death sentence on the basis of the prosecutor's argument and in the absence of appropriate jury instructions, finding that "a reasonable juror could well have believed there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

The en banc court found constitutional error in this case. It ruled, appropriately, that "[t]he California Supreme Court's conclusion to the contrary, on the basis of *Boyde*, which did not address improper legal argument by a prosecutor or a court's failure to provide jury instructions to correct the attorney's legally erroneous argument, was an unreasonable application of 'clearly established' Supreme Court precedent. When the effect of a mitigation instruction, viewed in the full context of the trial, is to confuse or mislead the jury in its duty to consider all relevant mitigation evidence, there has been constitutional error." *Id.* at 1216.

* * *

IV. CONCLUSION

According to this Court's decision in *Penry*, 492 U.S. at 319, "It is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." Under the unique combination of circumstances in this case, there is a reasonable likelihood that Payton's jury was denied that right, and the California Supreme Court was objectively unreasonable in holding otherwise. The petition for writ of certiorari should be denied.

DATED: March 24, 2004.

Respectfully submitted,
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